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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAYVION T. GALLOWAY et al.,

Defendants and Appellants.

B232165

(Los Angeles County
Super. Ct. No. YA071844)

APPEAL from judgments of the Superior Court of Los Angeles County.

Steven R. VanSicklen, Judge. Judgments affirmed as modified.

Donald R. Tickle, under appointment by the Court of Appeal, for Defendant and Appellant Jayvion T. Galloway.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Zecorey T. Marcus.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jayvion Galloway and Zecorey Marcus of one count of special circumstance murder and the court sentenced them to life without possibility of parole. Galloway and Marcus were also convicted of various other crimes and given a variety of sentences. We affirm the convictions and modify the sentences.

FACTS AND PROCEEDINGS BELOW

A. The Robbery of Pedro Guerrero

Anna Sanchez, a friend of defendants Galloway and Marcus, testified that she drove defendants to a convenience store in Gardena and waited for them in her car while they went into the store to buy rolling papers for marijuana and orange juice. After a short time, Galloway came out of the store and told Sanchez to park her car across the street because he was going to rob a man he had seen in the store cashing a check. Moments after Sanchez moved her car, defendants came running toward her. Galloway was holding a black revolver. Defendants jumped into Sanchez's car and Galloway told Sanchez: "Go, go, go." Sanchez drove away as Galloway handed the gun to Marcus in the backseat. She asked them what happened "and they said they robbed the man that was in the store cashing his check." Sanchez identified defendants from a surveillance video shot from within the store.

Pedro Guerrero testified that he went to a store in Gardena to cash a check for \$450.00. As he sat in his car, putting away his money, two men walked up. One man pointed a black gun at Guerrero's head. "They told me to give them the money or that they would kill me," Guerrero testified. Guerrero gave the money to the man with the handgun. He did not report the robbery to police because he was afraid but he told the storekeeper about it. A week later the police located Guerrero and showed him photographic lineups and he identified a photograph of Galloway as the man who robbed him with a handgun.

B. The Murder of Hae Sook Roh

Five days after the Guerrero robbery, at approximately 6:45 p.m., Arthenia Thomas heard gunfire coming from the direction of a T-shirt shop in Gardena and saw two men running from the shop and down the street toward a restaurant where she lost sight of them. Her only description of the two men was that they were wearing black “hoodies” and had bandanas over their faces. A few minutes later a silver four-door car drove “really fast” out of the restaurant parking lot. Because the windows were tinted, Thomas could not tell how many people were in the car. Thomas testified that the car depicted in People’s exhibit 4 looked like the car she saw leaving the parking lot.

When the police responded to the shooting, they found the body of Hae Sook Roh, who had worked at the T-shirt shop, lying dead behind the counter near the cash register.

The prosecution showed the jury an audio and video recording from a surveillance camera in the T-shirt shop. The video showed a black male with a gun in his left hand entering the area in front of the cash register. The man wore white pants, a long white T-shirt and an open waist-length jacket. He had a white cloth tied across his face below his eyes. The bottom left hand portion of the video showed the pant leg and shoe of a second person. The audio portion of the tape contained the voice of the man with the gun saying: “Give it up. Give it up. Give me the money.” A second voice said “Give him the money” and then the gunman fired at Roh saying, “Bitch. Give it up.” He repeated “Give it up” and then shot Roh two more times, grabbed the money from the register and ran. The gun was not recovered. The take from the robbery-murder was approximately \$35.

Sanchez testified that she was at Galloway’s house on the day of the murder. When it started to get dark, Galloway went to the trunk of his mother’s car and changed into basketball shorts, a white T-shirt and waist-length jacket. He then began waiting in front of the house. A gray Chevrolet Impala with tinted windows pulled up in front of the house. Someone inside the car opened the back door, and as Galloway got in, Sanchez saw Marcus lean over. Sanchez identified the car shown in the People’s exhibit 4 as the

car she saw that evening. The same car returned to Galloway's house 20 to 30 minutes later and Galloway got out. Sanchez observed that Galloway was breathing heavily, his palms were sweating and he was acting "like he was nervous and scared." Galloway told her that "he shot a lady at the T-shirt place." He "started laughing like it was funny" and said "the bitch wouldn't die. So he just had to keep shooting her." Sanchez asked Galloway why he shot the lady and Galloway replied that he was mad because he wanted to rob the store but "right before he walked in, she dropped the money [in the floor safe] [a]nd so he shot her."

A few days later Galloway showed Sanchez a YouTube video of the murder and robbery at the T-shirt shop. He laughed again while he watched it. Sanchez recognized Galloway on the video because he was wearing the same clothes he wore when he left his mother's house the evening of the murder. She also recognized the gun in the video as the gun Galloway had used in the robbery of Pedro Guerrero.

C. The Defendants' Custodial Statements

After defendants were arrested, they were seated next to each other on a bench in a hall of the jail. The bench had a hidden recording device. The prosecution played the recording of the defendants' conversation to the jury. In that conversation Galloway told Marcus that the police showed him a picture of Marcus inside the store just before the Guerrero robbery. Marcus acknowledges he will have to serve 15 years for the robbery but told Galloway that if he got bailed out "I'm gone." Galloway told Marcus not to worry because he admitted the robbery and told the police Marcus had nothing to do with it and that he didn't even know Marcus. Later in the conversation, Galloway admitted his involvement in the murder. Marcus also admitted being at the scene of the murder, noting that the video showed him wearing the same shoes that he was wearing when he was arrested.

D. The Credibility of Sanchez

Sanchez admitted she played a role in the robbery of Guerrero, that she pleaded guilty to that crime, that she was in custody at the time of her trial testimony and that she was receiving lenient treatment in her sentencing in exchange for her testimony against defendants. She also admitted that she had previously been convicted of forgery and the unlawful taking of a motor vehicle.

Sanchez further admitted that she had been a regular user of marijuana for six to nine months prior to the murder of Roh; that she “smoke[d it] every day;” and that she had smoked marijuana just before the Guerrero robbery and was feeling “mellow” at the time. Sanchez testified that she smoked a type of marijuana known as “Chronic” which, she agreed, is a “particularly potent” and “intense” form of the drug. In addition to smoking marijuana, Sanchez stated that on weekends she used Ecstasy. (We take judicial notice that the T-shirt robbery and murder were not committed on a weekend.) She testified that she stopped using any drugs after May 12, 2008, the date of the robbery-murder.

The defense called a forensic toxicologist who testified that in his opinion someone who smoked Chronic every day over a six- to nine-month period would suffer from confusion, delusion and “disoriented perception.”

E. The Gang Evidence

Deputy Sheriff Christopher Cuff testified as the prosecution’s gang expert.

After testifying that the Shotgun Crips met the definition of a criminal street gang under Penal Code section 186.22, subdivision (f) and that Galloway and Marcus were active members of that gang, Deputy Cuff testified that he was familiar with the facts of the Guerrero robbery and the Roh murder, and that in his opinion, both crimes were committed for the “benefit” of the Shotgun Crips. Deputy Cuff explained that both crimes were committed in the gang’s territory which covers the Northwestern part of Los Angeles between El Segundo Boulevard on the North and Rosecrans Boulevard on the South and between Crenshaw Boulevard on the West and Western Avenue on the East.

Cuff further stated that both crimes enhanced the reputations of the perpetrators and the gang. He also testified that it was typical for gang members to commit crimes together to build trust between themselves and if they obtained money through crimes such as robbery, they were “expected to kick something back” to the gang.

Deputy Cuff did not testify about the defendants’ “specific intent” to promote, further or assist the criminal conduct of the gang’s members but, as Galloway concedes, there was sufficient evidence to support this element of the gang enhancement.

F. The Verdicts and Sentences

A jury convicted defendants of the robbery and murder of Roh with the special circumstance that the murder was committed in the course of the robbery¹ and found true the gun use and gang enhancement allegations. Defendants were also convicted of the robbery of Guerrero with true findings of gun use and gang enhancement allegations. Finally the jury found Galloway guilty of being a felon in possession of a firearm. After a bench trial the court found that Galloway had one prior serious felony conviction under the “Three Strikes” law.

For the murder of Roh, the court sentenced each defendant to life in prison without possibility of parole, plus a term of 25 years to life for the firearm enhancement and stayed the gang enhancement. For the robbery of Roh, the court imposed and stayed an upper term sentence of five years. With respect to the robbery of Guerrero, the court sentenced Galloway to a term of six years (three years doubled under the Three Strikes law) plus 10 years for the gang enhancement and 10 years for the gun enhancement and sentenced Marcus to three years plus 10 years for the gun enhancement and stayed the gang enhancement. Finally, the court imposed and stayed a sentence of eight months for Galloway’s possession of a firearm.

The defendants filed timely appeals.

¹ Death or life without parole are the punishments for a murder committed while the defendant is engaged in first degree robbery. (Pen. Code § 190.2, subd (a)(17).)

DISCUSSION

I. THE COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY TO VIEW THE TESTIMONY OF A “DRUG ADDICT” WITH “GREATER CARE” THAN A WITNESS WHO “DOES NOT ABUSE DRUGS”

Seeking to capitalize on the testimony of the forensic toxicologist regarding Sanchez’s use of marijuana and Ecstasy, defendants requested that the court give the jury the following instruction: “The testimony of a drug addict must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs. [¶] The jury must determine whether the testimony of the drug addict has been affected by the drug use or by the need to obtain drugs.” The court correctly refused this instruction for several reasons.

Our Supreme Court has suggested that “‘in appropriate circumstances’ a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case.” (*People v. Hartsch* (2010) 49 Cal.4th 472, 500.) But a trial court need not give a pinpoint instruction if it is argumentative, merely duplicates other instructions or is not supported by substantial evidence. (*Ibid.*)

The proposed instruction is not supported by the testimony of the toxicologist pertaining to drug addicts. Sanchez admitted to being a regular user of marijuana at the time of the crimes but neither she nor the toxicologist testified that she was a “drug addict.” Drug addiction is a “medical fact” (*People v. Victor* (1965) 62 Cal.2d 280, 301), usually established by expert opinion (see e.g. *People v. Chacon* (1967) 253 Cal.App.2d 1056, 1058-1059) and involves much more than just repeated use (*People v. Victor, supra*, 62 Cal.2d at pp. 301-302 [listing eight stages in the process of addiction].) For this reason, among others, defendants’ reliance on dictum in *United States v. Ochoa-Sanchez* (9th Cir. 1982) 676 F.2d 1283, 1289—that in some cases an instruction on evaluating the testimony of a heroin addict would be appropriate—is misplaced. Furthermore, the instruction is argumentative because it calls for the jury to examine the testimony of a drug user or addict with “greater care” than a non-drug-using witness—Galloway’s mother, for instance, who disputed Sanchez’s testimony about what

Galloway was wearing when he left her house the evening of the murder and how he was acting when he returned. There is no rational reason for the testimony of a drug user or addict to be examined with *greater* caution than any other witness despite the other witness's real or potential bias.

Finally, if the proposed instruction was intended to focus the jury's attention on the "disoriented perception" of a chronic marijuana user, it was redundant. The court provided the jury with comprehensive, commonsense standards for evaluating the credibility of the witnesses, including Sanchez. The instructions told the jury to consider, among other things: "How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened?"

We conclude, therefore, that the instructions the court gave in this case served to sufficiently instruct the jury on how to evaluate Sanchez's testimony and that refusal of the pinpoint instruction on her drug use did not deprive the defendants of a fair trial.

II. THE GANG ENHANCEMENTS FOR THE GUERRERO ROBBERY AND THE ROBBERY-MURDER OF ROH ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

There are two prongs to a gang enhancement under Penal Code section 186.22, subdivision (b)(1). Under the first prong the People have to prove that the defendant committed the crime "for the *benefit of*, at the direction of, or *in association with* any criminal street gang." (Italics added.) Under the second prong the People have to prove that the defendant acted "with the specific intent to promote, further, or assist in any criminal conduct by gang members." With regard to the crimes against both victims, the prosecution based the first prong of the enhancement on Deputy Cuff's testimony that in his opinion defendants committed the robbery of Guerrero and the robbery-murder of Roh for the "benefit" of the Shotgun Crips. On appeal, the People switched theories and contended that the defendants committed the crimes "in association" with the Shotgun Crips. There is insufficient evidence to satisfy the first prong under either theory so we do not reach the second prong.

A. The Guerrero Robbery

Deputy Cuff's opinion that the robbery was committed for the benefit of the gang rested on his belief that "because gang members are representatives of the organization . . . the gang's reputation is enhanced as a violent street gang." That may be true but, as our Supreme Court held in *People v. Albillar* (2010) 51 Cal.4th 47, 60, in enacting the gang enhancement the Legislature made it "clear that a criminal offense is subject to increased punishment . . . only if the crime is "gang related." [Citation.] Not every crime committed by gang members is related to a gang."

The evidence regarding the robbery is insufficient to support Deputy Cuff's opinion that the robbery was committed for the benefit of the gang such that the crime was gang related. Although it is undisputed that Galloway and Marcus were members of the Shotgun Crips at the time they robbed Guerrero and that the robbery occurred in the gang's territory, no evidence suggests that Galloway or Marcus uttered the gang's name during the offense, wore gang colors or made gang signs or that Guerrero knew that Galloway or Marcus was a gang member. Moreover, no evidence indicates that a member of the Shotgun Crips drove the defendants to and from the crimes.² Finally, no evidence establishes that the defendants shared the proceeds of the robbery with any other members of the gang. Rather, the evidence shows that this was a crime of opportunity. Defendants went to the store to buy rolling papers for marijuana and orange juice and happened to see Guerrero cash a check for a large amount of money. They quickly arranged the robbery telling Sanchez to move her car and then waited for Guerrero in the parking lot and robbed him at gunpoint. Defendants split the proceeds from the robbery and Galloway used his share to buy marijuana and clothes for himself and presents for Sanchez. The evidence thus demonstrates that the crime benefitted defendants personally, not that it was "gang related."

² Deputy Cuff testified that Sanchez was not a member of the Shotgun Crips.

B. The Robbery-Murder of Roh

With respect to the robbery and murder of Roh, Deputy Cuff testified that the crimes were committed for the benefit of the Shotgun Crips because they would enhance the gang's reputation as a "violent street gang." He also testified that Galloway's committing crimes in general enhanced his reputation in the gang and with Marcus. Deputy Cuff's opinion is not supported by the facts of the case and the reasons he gave for his conclusion. (*People v. Lawley* (2002) 27 Cal.4th 102, 132 [value of expert's opinion rests upon the facts and reasoning from which the opinion is formed].)

As to Deputy Cuff's observation that the crimes would enhance Galloway's reputation in the gang and with Marcus, those are personal benefits to Galloway, not to the gang. Deputy Cuff's conclusion that Roh's murder benefited the Shotgun Crips by enhancing their reputation for violence assumes that people in the community knew that the crimes were committed by members of the gang. The evidence does not support that assumption. Deputy Cuff testified that Roh's murder attracted "a lot of media attention" and was a "very high profile incident" but he did not testify that any of this media coverage linked the murder to the Shotgun Crips or to any gang. Furthermore, there is no evidence that Marcus and Galloway were wearing distinctive gang attire or that they called out the name of their gang before, during or after killing Roh. In summary, there was no evidence which would cause persons in the community to link Roh's murder to the Shotgun Crips and there was no evidence from which Deputy Cuff could discern whether Marcus and Galloway were acting on behalf of the Shotgun Crips when they killed Roh or acting on their own behalf as in the Guerrero robbery.

Respondent's theory that the crime was committed in association with the Shotgun Crips also fails for lack of sufficient evidence. The enhancement applies to felonies committed "in association with any criminal street gang" not in association with a *member* of a criminal street gang. Thus, evidence that Marcus and Galloway associated in the murder of Roh is not evidence that the murder was committed "in association with

[a] criminal street gang.” No evidence was presented as to whether any other passengers in the car were gang members.³

III. THE REMAINING ISSUES RAISE NO CONTROVERSY

Galloway contends the trial court erred in finding that his juvenile adjudication for robbery was a strike under the Three Strikes law. He concedes, however, that our Supreme Court rejected this contention in *People v. Nguyen* (2009) 46 Cal.4th 1007 and that we are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The People concede that the trial court erred in imposing a parole revocation fine on the defendants since they were sentenced to life without the possibility of parole (*People v. McWhorter* (2009) 47 Cal.4th 318, 380) and that Galloway is entitled to an additional 55 days of presentence credit. We will modify the judgments accordingly.

DISPOSITION

The judgments are modified to strike the gang enhancements as to both defendants, to strike Marcus’s 25 years to life firearm enhancement and to strike imposition of parole revocation fines as to both defendants and to award defendant Galloway an additional 55 days of presentence credit. In all other respects the judgments are affirmed. The trial court is directed to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.

³ Our reversal of the gang enhancements does not require resentencing of the defendants but requires us to strike Marcus’s firearm enhancement under Penal Code section 12022.53, subdivision (e)(1)(A).